

N. KEITH CHAMBERS  
EXECUTIVE DIRECTOR

IN THE MATTER OF:

Complainant,

**MICHAEL HOIT, and A.D. COLBURN,  
LLC, d/b/a DANVILLE INN &  
CONVENTION CENTER,**

CHARGE NO: 2005SN3474 &  
2005SF3475  
EEOC NO: 21BA52144  
ALS NO: S06-488 Cons.

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Danville, Illinois on October 2, 2007, after Respondent A.D. Colburn LLC was found to be in default pursuant to an Order entered on July 9, 2007 for failure to file a verified answer to the instant Complaint. Neither Respondent appeared at the public hearing,<sup>1</sup> and Complainant has filed a brief seeking \$52,878.42 in assorted damages/civil penalties, as well as \$11,340 in attorney's fees. Accordingly, this matter is ready for a decision.

1. On January 5, 2005, Respondent, A.D. Colburn LLC, d/b/a/ Danville Inn & Convention Center, hereinafter referred to as "Colburn," hired Complainant to be a bartender in a building complex to which Colburn had obtained a management contract to operate a bar and

<sup>1</sup> Service of the Complaint was never achieved on Respondent Hoit, despite several attempts to do so. On the last attempt, the Complaint was returned with the notation "Moved Left No Address." Thus, an Order will be entered that recommends that Respondent Hoit in this consolidated action be dismissed for lack of personal jurisdiction.

an off-track betting parlor. Prior to her hire by Colburn, Complainant had served in a similar position under a different employer at the same bar since March of 1994.

2. At all times pertinent to the instant Complaint, Complainant's job duties were to serve alcoholic drinks and food to customers.

3. At all times pertinent to the instant Complaint, Respondent Michael Hoit was Complainant's supervisor.

4. At all times pertinent to the instant Complaint, Colburn's bar operated under an unwritten rule that employees were not to drink while on duty, but could have three free drinks after their shift was over. As a matter of practice, however, Hoit ordered more than three free drinks for himself and his guests during this timeframe.

5. On March 23, 2005, Hoit told Complainant at 5:30 p.m. on her regularly scheduled 3:30 p.m. to midnight shift that she was to serve herself, as well as all of the employees, including under-aged Carla Fuller and Brianne Rosnett, with free alcoholic drinks. Complainant thereafter complied with Hoit's request.

6. After Complainant had served free drinks to her co-workers on March 23, 2005, Hoit began flirting with the female staff, including Complainant and Fuller while Complainant attempted to perform her regular bartending duties. At various times during the shift, Hoit told Complainant that she was "sexy" and "hot." Also, during various points during the evening, Hoit asked on multiple occasions Complainant and Kristi Martin, a female bartender who worked in the off-track betting area of the building, to go out with him after the close of the shift. Both Complainant and Martin refused Hoit's requests.

7. At some point during her shift on March 23, 2005, Complainant informed Hoit that she did not want to have a relationship with him because she had been previously terminated at another business for having a relationship with a boss. Hoit told Complainant that she would not lose her job.

8. At the close of the shift on March 23, 2005, Hoit grabbed Complainant and kissed her while forcing his tongue down her throat. Complainant rebuffed Hoit, who then left the bar.

9. On March 24, 2005, Complainant came into work and asked Hoit for the money bag to stock the cash register. After Hoit retrieved the money bag, he again told Complainant that she was "sexy" and "hot" and again asked her to leave with him after her shift. Complainant, who felt uncomfortable by Hoit's questions, avoided answering Hoyt.

10. At some point between April 3, 2005 and April 28, 2005, Carla Fuller told Complainant that she had been terminated by Hoit. Based on her conversation with Fuller, Complainant believed that Hoit was going to terminate her.

11. On or about April 21, 2005, Hoit posted at the bar a written policy that required all bartenders to keep the bar physically clean at all times and to refrain from serving liquor to minors. The notice also claimed that the liquor inventory was not matching up with recorded sales of liquor and directed employees not to have any sexual relationships with the customers.

12. On or about April 26, 2005, Hoit asked Complainant if she felt that what he did on March 23, 2005 was wrong. Complainant told him that she believed that what he had done was wrong because of the potential it had for getting her fired. Hoit then told Complainant that he did not think that he had done anything wrong.

13. On April 27, 2005, Complainant appropriately charged all of her customers for any alcohol served that evening.

14. On April 28, 2005, Hoit called Complainant into his office to tell her that she was being terminated because the liquor inventory did not match up with the empty beer bottles and cups found in the garbage during Complainant's prior shift. The actual reason for Complainant's termination was the fact that she had rebuffed Hoit's sexual advances.

15. At all times pertinent to the instant Complaint, Complainant did not welcome any of Hoit's sexual advances and found them to be offensive.

16. Hoit's sexual advances created a hostile, intimidating and offensive work environment for Complainant that substantially interfered with her ability to perform her job.

17. On May 10, 2005, Complainant filed the original Charge of Discrimination alleging sexual harassment and retaliation.

18. Complainant looked for work from May of 2005 to September 17, 2005. During that time, several of Complainant's applications for employment were refused. On at least one occasion, Hoit had informed a prospective employer that: (1) Complainant was not eligible for rehire by Respondent Colburn; (2) Complainant could not be trusted; (3) Complainant had been stealing product from the bar; and (4) Complainant was having sex with clients that entered from a nearby hotel. Hoit gave the negative unfavorable employment reference(s) in retaliation for Complainant's having filed the original Charge of Discrimination.

19. At the time of Complainant's termination, she was making \$7.50 per hour for a 40-hour work week (i.e., \$300 in wages) plus \$300 in tips per week. Complainant's lost wages from the April 28, 2005 termination to the start of her employment on September 17, 2005, i.e. 21 weeks, was \$12,600.

20. On September 17, 2005, Complainant obtained employment at the Hawthorn Inn performing services in a nursing home at \$7.00 per hour for a 30-hour work week. Complainant stayed employed at the Hawthorne Inn for a total of 23 weeks, thereby incurring a \$390 per week wage loss (i.e., \$600 minus \$210) from what she could have made had she still been employed at Respondent Colburn. Complainant's total wage loss during this 23-week period was \$8,970.

21. On October 13, 2005, Complainant filed an amended Charge of Discrimination alleging that Respondent Colbert had given via Hoit an unfavorable employment reference in retaliation for Complainant's act of filing the original Charge of Discrimination.

22. Complainant began employment at Starcrest Cleaners on March 3, 2006 performing services that paid her \$7.00 per hour over a 40-hour work week. Accordingly,

Complainant incurred a \$320 per week wage loss (i.e., \$600 minus \$280) from what she could have made at Respondent Colburn had she remained there. Complainant worked a total of 61 weeks at Starcrest before quitting on May 11, 2007 for personal reasons. Complainant's total wage loss for this time period is \$19,520.

23. Complainant is entitled to statutory prejudgment interest at the rate of five per cent on the total amount of her back wage claim.

24. Barbara Delanois represented Complainant throughout the proceedings in this matter. Ms. Delanois charges \$180.00 per hour for her services representing clients in discrimination matters and has been an attorney in the Vermilion County area for the past 16 years. The reasonable hourly rate is \$180 per hour.

25. Ms. Delanois expended 70 hours representing Complainant in her action against Respondent Colburn, as well as in Complainant's related individual actions against Respondent Hoit and the owner of Respondent Colburn. The Department dismissed the portions of the Charge of Discrimination against the owner of Respondent Colburn on April 28, 2006.

26. The reasonable number of hours Ms. Delanois expended on behalf of Complainant in her action against Respondent Colburn is 58 hours, which translates into a fee award of \$10,440.

27. On July 9, 2007, an Order was entered that found Respondent Colburn to be in default due to its failure to file a verified answer to the instant Complaint.

28. Respondent Hoit was never served with a copy of the instant Complaint despite several attempts by the Commission and Complainant's counsel to serve him.

#### **Conclusions of Law**

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act.

3. As a consequence of the Default Order entered on July 9, 2007, all of the allegations contained in the instant Complaint are deemed admitted.

4. A prevailing complainant may receive actual damages, including attorney's fees and prejudgment interest arising out of her Human Rights Act claim.

5. Respondent Colburn is not subject to a civil penalty in the instant Article Two claim.

### **Discussion**

On July 9, 2007, an Order was entered that found Respondent Colburn to be in default due to its failure to file a verified answer to the allegations in the instant Complaint. As a result of the default, Respondent Colburn has admitted to all of the allegations contained in the Complaint. (See, for example, *Haluska and Milholic*, IHRC, ALS No. 11760, February 20, 2004.) Specifically, Respondent admitted that Hoit subjected Complainant to unwelcome sexual comments and conduct over a two-day period that included a forcible kiss and unwelcome invitations to leave work and go home with Hoit. Respondent additionally admitted that: (1) Hoit's conduct created a hostile and offensive work environment that substantially interfered with Complainant's ability to perform her bartender job; (2) Hoit manufactured false allegations of theft against Complainant and discharged her in retaliation for having complained about his sexual harassment; and (3) Hoit generated false and unfavorable employment referrals to prospective employers in retaliation for Complainant's act in filing the instant Charge of Discrimination. While a default judgment does not admit that the allegations contained in the Complaint constitute a legal cause of action under the Human Rights Act (see, *Kessinger and Harshman*, IHRC, ALS No. 04-440, January 23, 2006), I find that Complainant has established actionable claims for sexual harassment and unlawful retaliation through the admitted allegations in the Complaint.

As to the issue of Complainant's damages, I note that Complainant has asserted a back wage claim based on separate periods of unemployment and underemployment that stretched

from April 28, 2005 to May 11, 2007. Unfortunately, the issue has been rendered somewhat complicated due to a notation that Complainant's counsel made in her notes supporting her fee petition that Complainant told her on February 16, 2007 that Respondent Colburn no longer held the management contract to run the business where Complainant had worked. If true, Respondent's cessation of business would have served as a cut-off of any back wage claim since Complainant could not show that her underemployment at that time was causally related to her discharge when apparently no one was being employed by Respondent Colburn at the subject bar. Indeed, Complainant's counsel apparently thought that there was at least a kernel of truth to Complainant's report about Respondent Colburn's business demise since there is a February 16, 2007 notation in counsel's fee petition that she spent time researching the question as to whether Respondent Colburn was still a viable LLC, and whether Complainant could file some sort of *ultra vires* action seeking access to the assets of Respondent Colburn that may have been transferred to a third-party.

Still, while certain provisions of the Code of Professional Conduct (i.e., section 3.3(a)) preclude counsel from misleading a court about relevant facts especially where an opposing party is not present in the courtroom, the state of the record is unclear as to when Respondent Colburn ceased doing business at the bar/off-track betting location. Thus, although a couple of additional questions by Complainant's counsel could have cleared up the issue, I will measure Complainant's back wage claim from the date of her discharge up to and including May 11, 2007, when she quit one of her subsequent jobs for personal reasons because there is no alternative cut-off date firmly established in the instant record. Therefore, in using these operative dates, I find that Complainant is entitled to: (1) \$12,600, which represents a 100 percent back wage claim from April 28, 2005 to September 17, 2005, i.e. 21 weeks at \$600 per week; plus (2) \$8,970, which represents 23-week partial back wage claim beginning on September 17, 2005, that consisted of a \$390 per week difference in what she made at the Hawthorn Inn and what she could have made at Respondent Colburn; and (3) \$19,520, which



represents a 61-week partial back wage claim beginning on March 3, 2006 to May 11, 2007, that consisted of a \$320 per week difference between what she made at Starcrest Cleaners and what she could have made at Respondent Colburn (assuming it was still a viable entity). Accordingly, Complainant is entitled to a total of \$41,090 in back wages.<sup>2</sup>

Complainant also seeks the imposition of a \$10,000 civil penalty against Respondent Colburn under section 8B-104(C)(i) of the Human Rights Act (775 ILCS 5/8B-104(C)(i)). However, civil penalties under that section are reserved for discriminatory housing complaints filed under Article 3 of the Human Rights Act and do not apply to the instant Article 2 Complaint. (See also, *Clark and Windy City Waste and Recycling, Inc.*, IHRC, ALS No. 03-059, April 17, 2006.) Accordingly, I will recommend that Complainant's request for a civil penalty be denied. Complainant also seeks an award of interest at the rate of six percent on her actual damages. Complainant's brief, though, does not give any citation as to where the suggested six percent figure comes from, and I would note that the statute that grants prejudgment interest (i.e., 815 ILCS 5/205/2)) uses a five percent figure, while the statute that grants post-judgment interest (i.e., 735 ILCS 5/2-1303) uses a nine percent figure. Thus, given that the Commission, in *Patterson and State of Illinois, Dept. of Mental Health and Developmental Disabilities*, 37 Ill. HRC Rep. 75, 78 (1988), has found that post-judgment interest begins to run only from the date of a final Order and Decision, I will recommend that Complainant receive prejudgment interest at the five percent figure. Complainant has not sought any emotional damages in her post-hearing brief, and thus none will be recommended.

As to the attorney's fee petition filed by Complainant's counsel<sup>3</sup>, I note that counsel seeks a total of \$11,340 (i.e., 63 hours at \$180 per hour) that counsel attributes to her

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<sup>2</sup> While Complainant only sought \$40,457 in back wages in her post-hearing brief, the mathematical calculations used by Complainant's counsel did not accurately reflect the actual per week losses experienced by Complainant.

<sup>3</sup> Complainant has also incorrectly cited section 8B-104(D) of the Human Rights Act (pertaining to remedies available for housing discrimination claims) as support for her attorney's fees claim.

representation of Complainant in her action against Respondent Colburn. The requested amount is actually ninety percent of the 70 hours spent by counsel on three actions (the instant Complaint, as well as the related claim against Respondent Hoit and the dismissed individual claim against the owner of Respondent Colburn), and counsel has argued that a ten percent reduction is appropriate from the total time spent on all three claims given the fact that time spent on Complainant's claims against Hoit and the owner of Respondent was necessary to the pursuit of her claim against Respondent Colburn. In this respect, I agree with Complainant's counsel and will adopt the ten percent discount. However, in reviewing the list charges, I note that Complainant's counsel spent seven hours drafting a complaint that was never filed with the Commission. Because I find that time spent on this endeavor is excessive, I will reduce the fee request by five hours (i.e., from 63 to 58). Complainant's counsel's request of \$180 per hour is adequately supported by her own affidavit, as well as the affidavit supplied by attorney Steven Blakely. Accordingly, I will recommend that Complainant receive a total of \$10,440 in attorney's fees.

### **Recommendation**

For all of the above reasons, it is recommended that:

1. The default judgment order entered against Respondent Colburn on July 9, 2007 be sustained;
2. The Complaint and the underlying Charge of Discrimination against Respondent Michael Hoit be dismissed for lack of personal jurisdiction.
3. Complainant receive \$41,090 in back wages.
4. Complainant receive pre-judgment interest at five percent on her back wage claim.
5. Complainant's request for imposition of a civil penalty be denied.

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However, attorney fees are permitted for Article 2 actions under section 8A-104(G) of the Human Rights Act.

6. Complainant receive \$10,440 in attorney's fees.
7. Respondent Colburn be instructed to cease and desist from committing sexual harassment and unlawful retaliation in violation of the Human Rights Act and to provide Complainant with a neutral employment reference to prospective employers of Complainant.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 4TH DAY OF DECEMBER, 2009